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IN THE

Supreme Court of the United States

October Term, 1958

No. 17

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

v.

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE RESPONDENTS, RKO THEATRES, INC. and RKO FILM BOOKING CORP.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE RESPONDENTS, RKO THEATRES, INC. and RKO FILM BOOKING CORP.

Opinions Below

The opinion of the District Court is reported in 141 F. Supp. 658-673 (R. 555-581).

The opinions of the Court of Appeals for the Second Circuit are reported at 248 F. 2d 438 (R. 689-709).

Jurisdiction

The judgment of the Court of Appeals was entered on September 9, 1957 (R. 710). The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254.

An order allowing certiorari was entered on January 20, 1957 (R. 711).

Questions Presented

The only real question presented on this appeal is whether the Trial Court erred in its findings of fact and conclusions of law that there was not a conspiracy among the respondents to injure the petitioners in their property or business. These findings of fact and conclusions of law were affirmed by a divided court. However, because of certain language contained in the dissenting opinion of the Court of Appeals, the petitioners seek to present the following questions:

A. Whether the lower Courts misapplied this Court's decision in *Emich Motors Corporation* v. *General Motors Corporation*, 340 U. S. 558 (1951) by failing to make available to petitioners "all matters previously established by the Government in anti-trust actions" id. at 568.

B. Whether the lower Courts' failure to find illegal injury in this case was due to their failure to recognize the Paramount judgment as proof of the alleged conspiracy.

C. Whether, quoting from Clark, C. J., (dissenting opinion R. 705) "the trial judgment in my view gave the Paramount judgment not only 'a niggardly construction', but one quite opposite to its intended meaning as to the issues involved."

D Whether, (Clark, C. J., dissenting R. 709) "there seems to be a developing trend in some of our trial courts of hostility toward the 'big' anti-trust cases and of discovering obstacles—going even back to matters of pleading and pre-trial—in the way of a free showing of the need of a remedial relief."

Statutes Involved

The Statutes involved are the Act of July 2, 1890, 26 Stat. 209; and the Act of October 15, 1914, 38 Stat. 730, commonly referred to as the Sherman and Clayton Acts.

Statement

Petitioners on this appeal assert in effect that the Court of Appeals has decided "a Federal question probably in conflict with applicable decisions of this Court." The appeal is based on the theory that the majority of the Court of Appeals has misinterpreted and misapplied the decision of this Court in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, and his misconstrued Section 5 of the Clayton Act and misapplied this Court's decision in *Emich Motors Corporation* v. *General Motors,* 340 U. S. 558, by failing to make available to petitioners all matters previously established by the government in anti-trust actions (R. 568). That theory is made possible only by petitioners' complete distortion of the decision of the District Court and the majority opinion of the Court of Appeals. Petitioners then ask that this Court reverse the judgment herein on the theory that this case calls for the exercise of this Court's supervisory jurisdiction.

Statement of the Case

The issues in this case:

1. Did the Respondents combine and conspire in violation of the anti-trust laws of the United States to exclude the petitioners from the opportunity of licensing on a competitive basis their feature motion pictures to the Loew's and RKO theatres exhibiting feature

motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?

2. If so, were the petitioners directly damaged in their business or property as the result of said illegal combination and conspiracy, and if so, in what amount?

Petitioners' History

PRC Productions, Inc. had for many years prior to the commencement of this action been engaged in the business of producing second rate motion pictures mostly of the action and western type which had been generally exhibited for the most part in inferior theatres. The negative costs were low, the national grosses were low. It terminated all activity in that regard in 1946, when all its assets were transferred to Eagle Lion Studios.

Eagle Lion Films, Inc. was organized in the fall of 1945 and was engaged in the business of distributing motion pictures during the four seasons 1946-1947, 1947-1948, 1948-1949 and 1949-1950, down to June 10, 1950, when Eagle Lion Classics took over.

Eagle Lion Studios, Inc. was engaged in the business of producing motion pictures prior to the institution of this suit and continued to 1949.

At the time this suit was instituted, the Chesapeake Industries owned all the stock of the other corporations herein, and up to May 1, 1952 was known as "Pathe Industries, Inc.," its prior corporate name.

At the time of the commencement of the alleged damage period herein, Eagle Lion had for its source of supply for distribution the inferior PRC pictures, British pictures produced by J. Arthur Rank organizations, of which the better pictures were turned over to Universal for distribution (Exs. 3 & 4, R. 62, 63, 64).

To supplement this, Eagle Lion made some contracts for distribution of pictures produced by independent producers and also formed a production company called the "Eagle Lion Studios, Inc." and from these sources during the alleged damage period herein, 1946-1950, released for distribution in New York City 196 motion pictures.

Summary of Petitioners' Proof

Petitioners' proof was primarily statistical and utterly failed to establish a cause of action.

The first witness called on behalf of the petitioners was William C. MacMillan, Jr., President of Chesapeake Industries, Inc. The other petitioners in this action are wholly-owned subsidiaries of Chesapeake (R. 60). Mr. MacMillan became president of Chesapeake in 1948. Prior to that time he was an assistant secretary (R. 115). The witness was formerly a practicing attorney in Troy, New York, and at the termination of the war in 1945 joined the Robert Young organization (R. 114).

His primary function at that time was president of the Federation for Railway Progress, which was a magazine publication, and during 1946 and 1947 his primary job was in connection with this occupation (R. 114). In so far as the operation of Chesapeake is concerned, during the period 1946 up to 1948, when he became president, he had nothing to do with the operation of this corporation either in the acquisition of pictures or the distribution thereof, and his first active participation in the affairs of Chesapeake was in the summer of 1948, when he became president (R. 115).

He testified that when he became vice-president of these Eagle Lion companies in the summer of 1948, they were not operating at a profit, but had a substantial loss (R. 94). He testified that he was no judge of the quality of the pictures (R. 120), and upon being asked the following questions, testified as follows:

Q. Now, you are not claiming in this lawsuit any discrimination by RKO against any one of your particular pictures; isn't that a fact? A. Yes. The gist of our complaint is not against any particular pictures; against the practice that existed.

Q. And you so testified on your deposition, you are making no complaint against RKO or Loew's based upon discrimination against any individual picture released by you? A. That is correct (R. 124).

* * * * *

Q. Mr. MacMillan, as I also understood from your answers to Mr. Raftery, you are making no claim on any specific picture? A. We are not. (R. 125).

There was no testimony offered that Mr. MacMillan himself had ever done anything in respect to obtaining what he considered a better play-off of Eagle Lion pictures other than that in the spring of 1950 (and, as a matter of fact, he affirmatively testified that he never tried to sell RKO or Loew's pictures himself), he saw Mr. Kingsburg who was then president of RKO and stated to him that he did not think that Eagle Lion was getting competitive access to the RKO theatres, and that he intended to institute a suit for damages under the anti-trust laws (R. 96).

He then testified to a similar conversation with Mr. Moskowitz of Loew's at approximately the same time, the substance of which was practically the same as that with Mr. Kingsburg. Mr. Moskowitz told him definitely that they were not being discriminated against (R. 97). There was no evidence other than these two visits made to the two executives of RKO and Loew's by the petitioners in respect to their alleged claim of exclusion in the metropolitan area. Mr. MacMillan testified that William Heineman, Vice President in charge of Eagle Lion Films, was present with him on these visits.

He testified that William Heineman was vice-president in charge of sales of the company, and in conjunction with his sales staff determined the distribution policy for these Eagle Lion films (R. 90). Mr. Schwalberg and Mr. Heineman during the period in question were the vice-presidents in charge of sales. Referring to Mr. Heineman, counsel for petitioners, stated to the Court (R. 104-105) that the vice-president unfortunately was not available as a witness.

> The Court: Why not?
>
> Mr. McGovern: He is working for United Artists at the present time.
>
> The Court: He is still available.
>
> Mr. McGovern: He is still available but obviously it is difficult to call him.
>
> The Court: I do not know why, I presume if he came he would tell the truth, wouldn't he?
>
> Mr. McGovern: I presume he would.

Neither Mr. Heineman nor Mr. Schwalberg testified. The only inference that can be drawn is that if they did testify on behalf of Eagle Lion their testimony would have been unfavorable.

In commenting on the failure of the petitioners to call these witnesses, Judge Dawson in his opinion (R. 567) wrote as follows:

> "If plaintiffs had been discriminated against in the competitive licensing of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced. In fact, plaintiffs

> admitted that they had no complaint as to their treatment on any particular picture."

And Judge Dawson further commenting on the proof offered by the Respondents' testimony on this point (R. 567)—

> "The defendants, on the other hand, called as their witness Max Youngstein, who had been in charge of 'advertising, publicity and exploitation' for plaintiff Eagle Lion Films for two years from 1946. His testimony did not indicate that the treatment of plaintiffs' pictures on the circuits of the defendants was due to any effort of the defendants to deprive plaintiffs of a competitive position. He stated that the poor returns on plaintiffs' pictures was due to the fact that the films of the plaintiffs were from the standpoint of box office appeal, at 'the very bottom rung of the ladder' and 'much inferior' to films which were being offered by other distributors."

Rather than offer actual proof of whether or not they were excluded from the metropolitan market, tabulations were prepared in lieu thereof.

Mr. MacMillan had a chart prepared (Ex. 10, R. 647) designed to show the relationship between the film rentals that the petitioners took out of the New York area in relation to their national gross and the film rentals which the major distributors took out of the New York area in relation to their national gross. This was received in evidence as Petitioners' Exhibit No. 10, bearing the caption "Comparison of Eagle Lion Revenue with the Revenue of Major Distributors from Subsequent Run Theatres in Metropolitan New York", and a sub-caption "Ratio of Subsequent-Run Rental from Metropolitan New York to National Film Rental Less Such Subsequent-Run Rental" (R. 87). Exhibit 10 was prepared without any consideration as to whether the 196 pictures of the peti-

tioners were in any way comparable to the 96 pictures of the respondent-distributors.

The next witness on behalf of the petitioner, Norman Gross, testified that he was an assistant to the treasurer of Chesapeake Industries and had been employed by Chesapeake since October 1951, and prior to that time he was employed by Columbia Pictures Corporation in the home office in New York for approximately six years, and the last year as office manager of the New York exchange.

In respect to the records that he prepared from which exhibits were offered in this case, he stated that they were taken from the records of Eagle Lion Exchange that comprised the metropolitan area, he examined the records and the original data, and this was done under the supervision of Mr. Malamed, the treasurer of the Company. The witness examined and tabulated the record. He testified, in substance, that the records were tabulated and were simply sheets—several hundred of them—that contained information that was taken off at the exchange from what is known as a "cut-off card". This cut-off card contained the rentals received and where the Eagle Lion pictures played in the metropolitan area, and in respect to the 196 Eagle Lion pictures that were distributed and released during the period in question, the tabulations in respect to film rentals were compiled in that manner.

The tabulations and exhibits that were offered in evidence from the tabulations that were prepared by Mr. Gross were made without any consideration as to the comparability of the pictures in so far as quality, type, suitability of the particular pictures, star value, timeliness of subject, or any of the other business factors that are necessary to be taken into consideration in the distribution and exhibition of motion pictures.

This witness was not connected with the sales and distribution of the Eagle Lion Pictures, was no judge of the

quality of the product, and his testimony consisted only of computations and figures that came from the records of either the petitioners or from answers to interrogatories.

Mr. Gross further testified as follows:

> Q. Mr. Gross, do you have anything to do with the selling or licensing of the Eagle Lion Pictures in the City of New York? A. Absolutely nothing to do with it.
>
> Q. Now, who licensed the circuits here? A. I don't even know that.

In an effort to offer some testimony that petitioners were unable to get additional business from independent producers, Leon Kaplan, an attorney of Los Angeles, California, who was California counsel in certain matters for the petitioners, testified (R. 321-339). He testified that to his knowledge Eagle Lion did receive the product of 15 or 20 independent producers for distribution during the period in question. His testimony tended to show that basically the petitioner was a weak distribution company, and that the producers that came to him were more interested in securing moneys for the cost of production rather than primarily to secure the benefits of the distribution from this weak distributing company.

On page 34 of petitioners' brief, petitioners argue that independent producers upon whom Eagle Lion relied to obtain an adequate supply of pictures, refused to do business with Eagle Lion because the New York market was rigged. The only evidence offered on this point was the testimony of Mr. Kaplan above referred to. Kaplan's testimony was mostly hearsay and related to negotiations which never resulted in a distribution deal or resulted in a few instances in the production of low-bracket pictures. Perhaps, the fairest statement of Kaplan's testimony as to what he was told by others is (R. 338):

> "Alperson said that the eight major companies had established precedents for prices and times of playoff with the circuits that neither Eagle Lion nor any other independent had, and therefore the pictures of Eagle Lion, unless the picture had unusual strength so it could stand on its own feet, did not get as good a treatment because of the lack of precedent that the pictures of the eight majors got."

At R. 332, the same witness testified that he negotiated with a man named Spiegel to secure for Eagle Lion the distribution of a picture called "AFRICAN QUEEN." That Spiegel refused to make the distribution deal with Eagle Lion but did make a deal with United Artists, and that the United Artists' gross on the picture domestic was approximately $4,000,000.

At R. 335, the same witness testified that United Artists during that period of 1946 to 1950 was an independent distributor; that it had no interest of any kind or character in either RKO theatres or Loew theatres and was able to gross $4,000,000 in the domestic field.

As heretofore pointed out, Eagle Lion succeeded in 1946 to the business of PRC Pictures, Inc. This company was shown in the evidence to have been a distributor "on the very bottom wrung of the ladder;" perhaps handling the worst product of any distributor of motion pictures in the United States or at least as bad as the worst product.

John Peoples, a partner in Peat, Marwick, Mitchell & Company, certified public accountants, testified that he had made a summary of the operations of Chesapeake Industries, Inc. with respect to the operation of the motion picture subsidiaries. These statements were marked Exhibit 24 (R. 258), and showed for the motion picture producing and distributing company losses in every phase of their business during the period in question, and it was done on a worldwide basis. There was absolutely no proof offered that any part of this worldwide loss was occasioned by

anything of which petitioners were claiming existed in the New York area, and the only inference, if any, that could be drawn from this exhibit was that it was a poorly managed production and distribution company, without quality products, which was reflected by the losses demonstrated by this exhibit.

Neil Agnew was the last witness for the petitioners and added nothing to the probative value of the petitioners' case. He testified that he was familiar generally with the Eagle Lion product during this period, but could give no opinion as to what they would be expected to perform at the box office in the New York metropolitan area or outside the New York metropolitan area (R. 537).

Petitioners' exhibits, other than the Exhibit 24, were statistics that were compiled by Mr. Gross and offered either during the testimony of Mr. Gross or Mr. MacMillan, or where figures that were submitted to the respondents and offered and received the foundation of oral testimony.

Petitioners' Inadequate Proof of Damages

The only evidence offered by the petitioners in support of their purported claim for damages was Petitioners' Exhibit 10 (*supra*). This exhibit dealt with the ratio of revenues from subsequent runs in the New York subsequent run area to revenues from the remainder of the United States. One ratio was calculated for the petitioners, and another similar ratio was calculated for eight other distributors taken together, and in each case the ratio was for the season 1946-1947 through 1949-1950. These ratios showed the following:

That the petitioners took 6.4% of their revenue out of the New York subsequent run area and the eight distributors took 8.9% of their revenue out of the subsequent run territory in metropolitan New York. This was arrived at by comparing the profits of the 196 features distributed

by the petitioners and the selection of 96 features out of the eight distributors. The data for the Eagle Lion product was prepared by Mr. Gross from Eagle Lion records, and the data for the eight distributors was prepared from answers to interrogatories of these eight distributors when they were defendants in this case. This we will refer to as the "Gross Method of Calculation." The national grosses for the Eagle Lion pictures varied from $2,008 to $1,985,000. Those of the eight distributors varied from $46,900 to $5,459,500. The petitioners' calculation included 177 pictures that grossed below $500,000. Using the same identical ratios for calculation as used by Mr. Gross in arriving at the percentage, but comparing these groups of films having comparable rentals, the evidence shows the following:

The 177 Eagle Lion pictures which had an aggregate national film rental not in excess of $500,000 had a better return from the New York metropolitan subsequent runs than did the films of the eight distributors in the same national bracket. This was conceded by the witness Gross (R. 669, Loew's Ex. B.). The remaining 19 films each had a national rental of over $500,000 and received the best playing time and playing position to which its merits entitled it in the RKO and Loew's neighborhood theatres.

Therefore, using the same method of calculation that petitioners have in Exhibit 10, we find uncontradicted the following:

That 177 pictures of the petitioners did better in New York than the eight major distributors, and that there was absolutely no discrimination of any kind or character in respect to the remaining 19 pictures. They received the runs they were entitled to at the RKO and Loew's neighborhood theatres, grossed over $500,000, and substantial film rentals were paid by RKO and Loew's to the petitioners.

Evidently recognizing the weakness of the above proof in respect to damages, the following exhibits were received in evidence: Exhibits 27, 28, 32, 33, 34. These exhibits in no way either bolstered or supported petitioners' proof of damage. The comparisons used in these exhibits are misleading, and should have no weight in establishing evidence of damage.

In the light of Loew's Exhibit B and RKO's Exhibit A, and the additional evidence presented by respondents RKO and Loew's, it affirmatively appears that neither has a conspiracy been proven nor damages suffered by the petitioners as a result of any alleged conspiracy. There was no loss to the petitioners as a proximate result of any violation of the anti-trust laws by either of these respondents.

Summary of Proof Offered by Respondents

Robert L. Miller, a statistician in the employ of respondent RKO during the period in controversy, testified that he prepared the figures from the records of RKO and those of Eagle Lion that were offered to him, and upon the basis of those records compiled the necessary data for the RKO exhibits that were offered in evidence.

RKO's Exhibit A

This exhibit presents a complete picture of the play-off of Eagle Lion pictures on a first run in New York and the various percentages and ratios arrived at in the last method of calculation being that used by Mr. Gross (R. 370).

RKO's Exhibit B

In this exhibit Mr. Miller compiled a list of every picture of Eagle Lion pictures out of 196 that were screened by RKO during the period in question, and testified that during this period the pictures of all other distributors were

screened (R. 372-376). 129 pictures, according to Exhibit B, were screened. Of the pictures that were not screened, 42 were westerns. Mr. Miller further testified it was not the policy to screen all westerns as these were usually a part of a series, and after screening one or two it was not necessary to screen the others. 25 re-issues were not screened because they were, in all probability, screened when the picture was originally released.

RKO's Exhibits C, C-1, C-2, C-3, C-4

The following shows the play-off of the Eagle Lion pictures in the RKO neighborhood theatres:

Exhibit C —Destination Moon

Exhibit C-1—Red Shoes

Exhibit C-2—The Jackie Robinson Story and The Story of GI Joe

Exhibit C-3—Rebecca and the Paradine Case

Exhibit C-4—Arabian Nights and Sudan, Canon City and Raw Deal (R. 376-380).

RKO's Exhibit D

This exhibit shows the number of pictures played in the RKO metropolitan sub-run from 1946 to 1950, and the names of the companies from whom they were licensed:

The total for the season					1946-1947	was	526
"	"	"	"	"	1947-1948	"	469
"	"	"	"	"	1948-1949	"	485
"	"	"	"	"	1949-1950	"	525
					Making a total pictures of		2,005

and these pictures were licensed from thirty-odd distributors (R. 439).

Note: Loew's comparable Exhibit E showed that during the period in question Loew's licensed pictures from 38 distributors.

This exhibit further shows that during the period in question RKO theatres exhibited 111 Eagle Lion pictures. Loew's comparable exhibit (Loew's Exhibit E) showed that during the period in question Loew's exhibited 110 Eagle Lion PRC pictures in their metropolitan theatres.

Sol A. Schwartz, president of RKO Theatres, testified that he had been associated with the RKO respondent and its predecessors since 1922. He started with the Company in a secretarial position; from that position he became an assistant manager of a theatre, and then a district manager, a zone manager; then to the position of vice-president. On January 1, 1951, he was elected president. RKO, during the period in question, operated approximately 35 theatres on a first neighborhood run in the metropolitan area. He further testified during this period there were other theatres in the metropolitan area that were exhibiting pictures on a neighborhood first run. He supervised, during this entire period, the management and operation of the RKO theatres.

He testified that RKO Theatres maintained an efficient booking department consisting of several people under his direction whose duties were to buy films for these RKO theatres. That prior to the showing of pictures at the RKO theatres, they were screened not only by the film department, but members of the advertising department before decisions were made. The screenings were held daily, and were an important work of the men who were responsible for the booking and buying of pictures.

After the pictures were screened, they were solicited by film companies as to the buying and dating of pictures. There were regular series of negotiations with the representatives of distributors before deals were consummated. The determining factor whether the pictures were to be

bought was gone over carefully by people experienced by trial and error of many years as to what type of pictures would appeal in certain neighborhoods and would appeal to the largest percentage of people that they thought they could attract to the RKO theatres. They were desirous of booking for exhibition pictures that were not only suitable, but would produce the best revenue for the theatre and for the companies, and would proceed to try to get that picture through negotiations with the distributor.

Joseph R. Vogel, president of Loew's Incorporated, and in charge of Loew's theatre operations, testified to that respondent's general method of purchasing films, and the business considerations involved in licensing pictures in the Loew's theatres, more particularly the licensing of Eagle Lion pictures in the Loew's theatres.

The testimony of both Mr. Vogel and Mr. Schwartz was uncontradicted, and the record is abundantly clear from this testimony that the petitioners' pictures received not only fair treatment from the respondents, but any picture of Eagle Lion that was of sufficient quality received the play-off in either the Loew's or RKO houses that it was entitled to.

Mr. Russell Downing, president and managing director of Radio City Music Hall, testified as to the manner pictures were selected for exhibition at the Music Hall (R. 521); and further testified that the Music Hall was open to any distributor who had a picture of sufficient merit to show there; that he had knowledge of the product of Eagle Lion during the period 1946-1950; that at Eagle Lion's request the picture "Tulsa" was screened, and he went to a screening of "Destination Moon," and that these were the only pictures that Eagle Lion requested them to screen, and that they did not play any Eagle Lion pictures at the Radio City Music Hall because they did not measure up to the standards of quality required by the Music Hall (R. 526).

The Testimony of Max D. Youngstein

Mr. Youngstein, who has been connected with the motion picture industry for over sixteen years, is presently vice-president and co-owner of United Artists (R. 508), testified that in 1946 he joined Eagle Lion Films as advertising, publicity and exploitation director (R. 509), and continued with them until May of 1949. He further testified that he is familiar with 195 pictures that Eagle Lion were distributing during this period, and that he was in charge of their promotion and advertising (R. 509). In respect thereto, he gave the following testimony:

> Q. In your capacity as vice-president in charge of those activities were you also familiar with the product of other distributors, such as, for example, Paramount, Metro-Goldwyn-Mayer, United Artists, Universal, Columbia, and Allied or Monogram, Republic and so forth? A. Yes.
>
> Q. And RKO, excuse me. I slighted one of them. Could you, Mr. Youngstein, with your knowledge of that product and the knowledge of the product that you were charged with promoting, could you tell us the relative box office appeal of the product of Eagle Lion as compared to the product of the distributors that I have mentioned? A. I would say, with the exception of Monogram that we would be at the very bottom rung of the ladder.
>
> Q. And you worked on the promotion of this product as well as you could, isn't that correct? A. I had to appraise these pictures, yes, because it is a competitive situation. I had to.
>
> Q. You were promoting these pictures not only in New York but across the country as a whole, is that correct? A. Yes, New York, across the country as a whole and, to some extent, in our worldwide distribution, wherever we did have distribution releasing setups outside of the United States.
>
> Q. Are you in a position to appraise the relative box office appeal of these Eagle Lion pictures in the

New York market as compared to the pictures, let us say, of Metro-Goldyn-Mayer, Paramount, RKO, Warner, Universal, United Artists? A. At the time between 1946 and 1949?

Q. Correct. A. I would say that in my opinion, and this is a matter of opinion, no one can be very exact on this, but in my opinion, they were much inferior to the companies you outlined.

Q. So far as box office appeal in the New York area. That is what my question is directed to. A. Much inferior.

He was then shown respondent Loew's Exhibit F, which included the 18 Eagle Lion pictures that grossed more than $500,000 and that showed either the Loew's or the RKO theatres first neighborhood run (R. 512). After looking at the exhibit, the record disclosed the following (R. 513):

Q. Would you tell us, Mr. Youngstein, from your knowledge of those pictures and the relative market of available pictures whether in your opinion these pictures received the playing time or the playing position that they were entitled to receive, having in mind the merits of those pictures?

Mr. Wright: Of course, I think, if I might point out at this time, there is not the slightest foundation laid for any competence on this witness' part to say where any picture belonged or did not belong in these circuits in New York or anywhere else. It was, apparently, not part of his job to negotiate film contracts. He was concerned wholly with * * * and exploitation.

The Court: Here is a man who has had a long experience, who was in Eagle Lion, and a lot of other companies, and he is being asked whether in his opinion from that experience they played in the right relative position. I think he is sufficiently qualified to give an opinion on it. You may cross-examine him on it.

Mr. Wright: We have no objection, of course, to his giving an opinion about the pic-

tures as such. This is a somewhat narrower opinion as to what particular position they should have had.

The Court: I would assume that a man who is in charge of publicity and promotion for a company is qualified to have some opinion as to whether the picture is being exploited as it should have been exploited. I will allow him to answer the question.

Do you want the question read?

Mr. Gillespie: If you would like, I could rephrase it.

The Court: I think we can have it read.

(Question read)

A. I would say Yes, in view of what the competitive situation was at the time and the pictures available from other companies.

And at (R. 519-520), in response to two questions by the Court, testified as follows:

By the Court:

Q. You say these Eagle Lion pictures didn't have as great an appeal as the pictures of the other companies, the other major companies? Was that true generally throughout the country? A. Yes, it was true generally throughout the country but in different degrees. You would have to take pictures almost one by one and analyze them on the basis of their particular appeal. It is very frequent that a picture can do well outside New York that will have no great interest in New York. The reverse of that is also true. That is true not only of Eagle Lion but any other company in the business. There are pictures called pictures that are made for the sticks. I didn't say that derogatorily, but there are pictures like Ma and Pa Kettle which would show a tremendous disproportion in what they would earn outside of New York as against what they would earn in New York.

The Court:

Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York? A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the metropolitan territory. That is the entire metropolitan territory. The newspapers have that importance.

The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that receive terrible reviews in New York, they receive very bad trade paper reviews. They are pictures which I would say would do much better outside of New York than in New York.

The above testimony by a former executive of Eagle Lion who had actual first-hand knowledge of the petitioners' 196 pictures further establishes the fact that petitioners' difficulties were due solely to the poor quality of what petitioners were trying to sell and not to any combination and conspiracy between the respondents.

THE PARAMOUNT DECREE

The findings of fact and conclusions of law in the case of *United States* v. *Paramount, et al.,* were marked and received in evidence as petitioners' exhibits. Particular stress was placed by the petitioners on Finding 154(D). For this decree to have any probative value, it is incumbent upon the petitioners not only to show that there was a

continuance of the conspiracy during the period in question, but they must further prove the impact of this conspiracy in respect to the particular local situation. The type of proof offered by the petitioners does not show a continuance of any conspiracy; nor does it remotely show any impact on the petitioners as a result of any such finding in the *United States* v. *Paramount*, more particularly Finding 154(D).

The exhibits offered in evidence by the petitioners do not show a continuance of any violation of the *Paramount* decree by these respondents, and the evidence introduced by the respondents affirmatively proves there was no conspiracy to exclude petitioners' films from their first subsequent run theatres. The petitioners received fair treatment in dealing with the respondents, and that the respondents herein acted independently and dealt with the petitioners' pictures as they dealt with the pictures of other distributors. One cannot help but quote the late Judge Hand's observation prior to the entry of the *Paramount* decree when he stated on the record:

> "* * * This business of using a pretty obscure decree and decisions, as they have tried to do before, to lick somebody in litigation between themselves and other parties is crude judicial stuff, from the point of view of a judge, very, very crude stuff."

Regardless of the admission of the decree and findings in *United States* v. *Paramount Pictures, Inc.*, the appellants must prove that the respondents actually conspired to exclude the petitioners from the opportunity of license on a competitive basis of feature motion pictures to the Loew's and RKO theatres in the New York metropolitan area on runs subsequent to first-run Broadway. This was made clear in the recent case of *Theatre Enterprises, Inc.* v.

Paramount Film Distributing Corp., 346 U. S. 537 (1954), in which the Supreme Court stated:

> "* * * But the Paramount decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved * * * the Paramount decree alone could not support a recovery by petitioner."

See also,

Emich Motors v. *General Motors, supra,* 340 U. S. 558;

DeLuxe Theatre Corporation v. *Balaban & Katz Corp.*, 95 F. Supp. 983;

Monticello Tobacco Company v. *American Tobacco Co.*, 197 F. 2d 629.

Judge Waterman in the Court of Appeals not only considered finding (154(d)) and conclusion of law (No. 16) but also many of the other findings and conclusions.

> "After examining Finding No. 154(d) and Conclusion No. 16, as well as the other portions of the *Paramount* record that were relied upon by plaintiffs, the trial court, see 141 F. Supp. at 667, concluded that 'while the findings may perhaps constitute evidence * * * that Loew s and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case.' "

and in the footnote on the same page:

> "In addition to Finding No. 154(d) and Conclusion No. 16, the appellants call our attention to Findings No. 84, 99, 100, 127, 147(c), 156(b), and 158, and Conclusions No. 7 and 12 of the final decree in the *Paramount* case, Equity No. 87-273, S. D. N. Y., filed Feb. 8, 1950, aff'd, 339 U. S. 974 (1950). We have examined these findings and conclusions, as well as the many other findings and conclusions embodied in that decree. We conclude that their relevance to the issues here in suit is even less than that of Finding No. 154(d) and Conclusion No. 16, which are discussed in detail in our opinion *infra*."

This was a trial of a cause on the law side of the District Court by a judge without a jury which made the Trial Judge a trier of both the facts and the law. This case was presented, tried and decided on the facts by the District Court as the opinion of Judge Dawson clearly indicates.

Plaintiffs offered in evidence not only the decree as permitted by Section 5 of the Clayton Act, but also the findings of fact and conclusions of law in *United States* v. *Paramount*. Over defendants' objections, these were received by the Trial Court. At the close of plaintiffs' case, the defendants moved to dismiss plaintiffs' complaint, claiming that plaintiffs have failed to prove a prima facie case. This motion was denied as to both defendants (R. 368).

It then became defendants' duty to go forward with evidence to rebut plaintiffs' direct evidence as well as any help or assistance that the reception of the decree, findings of fact and conclusions of law in *United States* v. *Paramount* may have given to the plaintiffs in this case.

Defendants then called witness after witness who rebutted in full the direct evidence and any inferences or presumptions that may have arisen from the introduction

of the decree, findings of fact and conclusions of law in the *Paramount* case.

C. J. Clark in his dissenting opinion (R. 708):

> "Moreover plaintiffs point out that Eagle Lion Studios succeeded in 1946 to the business of PRC Pictures, Inc., one of the three nationwide independent film distributors found in the *Paramount* case to be adversely affected by the Paramount conspiracy."

There is no such finding in the *Paramount* case.

Again quoting from Judge Clark's opinion (R. 708):

> "I thus conclude that the plaintiffs presented a prima facie case which it became the duty of the defendants to rebut."

In other words, C. J. Clark held that the introduction of the decree made out a prima facie case. Judge Clark completely disregarded the holding of this Court in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954) in which this Court stated "the Paramount decree alone could not support a recovery by petitioner."

In his dissent, Judge Clark wrote after concluding that the Paramount decree made out a prima facie case for petitioner: "Thus dismissal below was unwarranted." In fact, his opinion reads as if there had been a dismissal at the close of plaintiffs' case and that the defendants offered no rebuttal.

Judge Dawson denied respondents' motion to dismiss at the close of petitioners' case, and respondents put in a full defense and judgment was entered below (R. 683):

> "Adjudged and Decreed that defendants have judgment against plaintiffs dismissing the complaint as supplemented and amended on the merits."

THE BURDEN OF PROOF IS ON THE PETITIONERS TO SHOW AFFIRMATIVELY THAT THEIR DAMAGE WAS PROXIMATELY CAUSED BY A CONSPIRACY BETWEEN LOEW'S AND RKO THEATRES TO EXCLUDE THE PETITIONERS FROM THE NEW METROPOLITAN AREA ON RUNS SUBSEQUENT TO FIRST-RUN BROADWAY.

Turning now to the question of conspiracy, it is first to be noted that the essence of a conspiracy is an agreement. The burden of proof is on the petitioners to affirmatively show that there was an agreement, either tacit or expressed, between the respondents Loew's and RKO to exclude the petitioners from the opportunity of licensing their pictures on a competitive basis in the New York metropolitan area on runs subsequent to first-run Broadway. There is no proof of any expressed agreement; neither is there any affirmative proof of a tacit agreement. There are no facts and circumstances that would support any such inference. The burden of proof being upon the petitioners, if the proven facts give equal support to each of two inconsistent inferences, *i.e.*, whether respondents did or did not conspire, judgment must be against the petitioners (*Penna. R. Company* v. *Chamberlain*, 288 U. S. 333, 339).

The petitioners must show more than conscious parallel action; he must prove an agreement. Moreover, similar business solutions, dictated by similar business considerations, cannot support an inference of conspiracy if the solutions are reasonable.

This was recently made clear in *Fanchon & Marco* v. *Paramount Pictures, Inc.*, 100 F. Supp. 84, aff'd 215 F. 2d 167. Petitioners contended that they had proven a conspiracy by showing a uniformity of action among the respondents. In entering judgment for the respondents, the Court said:

> "* * * No parallelism, conscious or unconscious can overcome a finding of reasonableness. And it is not

> our function in this type of action to secure a better bargain for a dissatisfied exhibitor. Our sole aim is to vindicate the anti-trust laws in so far as their violation may have brought injury to the plaintiff. What has gone before indicates clearly the factual and legal foundations for the conclusion that there has been no violation of the anti-trust laws by the defendants which has resulted in actionable injury to the plaintiff."

The petitioners must establish that they have suffered an economic loss which is a direct and proximate loss from the respondents' alleged illegal act. No presumption of injury arises from the mere fact of conspiracy. Injury must be specifically proven by the petitioners.

In *Beegle* v. *Thompson*, 7 Cir. 138 F. 2d 875, 881, certiorari denied 1944, 322 U. S. 743, 64 S. Ct. 1143, 88 L. Ed. 1576, the Court states, at page 881:

> "Allegations of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the fact from which injury accrued and upon which damages may be assessed as well as those with regard to the effect of the alleged violations upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."

And in *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341, Cert. Den. 273 U. S. 703, the Court said (p. 345):

> "The plaintiff who seeks recovery must bear the burden of proof, not only that there was an attempt or actual monopolization or a combine or conspiracy

in violation of the anti-trust law, but it must be shown that there was injury to him as a proximate result. Jack v. Armour & Co. (C. C. A.) 291 F. 741; Rice v. Standard Oil Co. (C. C.) 134 F. 464."

See, also

Gerli v. *Silk Association of America, et al.*, 36 F. 2d 968;
Westmoreland Asbestos v. *Johns-Manville Co.*, 30 F. Supp. 389;
Browlee v. *Malco Theatres*, 99 F. Supp. 312;
Twin Porta Oil Co. v. *Pure Oil Co.*, 8 Cir. 119 F. 2d 747; and
Alexander Milburn Co. v. *Union Carbide and Carbon Corp., et al.*, 15 F. 2d 678.

The Petitioners failed to produce the best available evidence for the trial either on the question of conspiracy or on the question of damage. Not a single witness was called to show that the Petitioner Distributors in this case had any quality merchandise to offer for exhibition in respondents' theatres. They did not show through their former General Sales Managers any effort to license their motion pictures for exhibition in respondents' theatres, although these witnesses (Schwalberg and Heineman) were available in New York City at the time of the trial. The only inference that the Trial Court could draw from their failure to produce the men charged with the duty to distribute their pictures in this area was that these witnesses could not testify favorably to Petitioners' claim, but would further support the testimony of Max Youngstein who was in charge of the exploitation of the petitioner distributors' pictures, not only in the New York area but throughout the whole country.

On the other hand, the respondents offered overwhelming evidence as to the lack of quality in most of the peti-

tioners' pictures; that the respondents, Loew's and RKO, were always on the alert for good pictures for exhibition; and that each of them during the alleged damage period played motion pictures in their New York metropolitan neighborhood theatres distributed by over thirty separate and distinct distributors of motion pictures. The Trial Court heard all the evidence, examined all the exhibits, admitted the *Paramount* decrees and wrote a clear-cut understandable opinion which completely disposed of the case on the merits.

In respect to the opinion written by the Trial Court on p. 4 of Petitioners' brief in the Circuit Court of Appeals, we find the following: "The opinion below accurately states those evidentiary facts to which it refers."

There is nothing in the majority decision of the Court of Appeals for the Second Circuit which is in conflict in any way with any decision of this Court or of any Court of Appeals. There is no question of law raised by the Petitioners which should be settled by this Court.

Paramount Film Distributing Corp. v. *Applebaum*, 349 U. S. 961 (1955);

Harrison v. *Paramount Pictures*, 348 U. S. 828 (1954);

G. & P. Amusement Co. v. *Regent Theatre Co.*, 349 U. S. 904 (4/19/55);

Fanchon & Marco v. *Paramount Pictures*, 348 U. S. 912 (1955);

Dipson Theatres v. *Buffalo Theatres*, 342 U. S. 926 (1952);

Fifth & Walnut v. *Loew's, Inc.*, 338 U. S. 940 (1950);

St. Louis Amusement Co. v. *Paramount Pictures*, 335 U. S. 854 (1948);

Momand v. *Universal Film Exchanges*, 336 U. S. 967 (1949).

There has been a complete failure of proof on the part of the petitioners to show any causal connection that any alleged damages to the petitioners were caused by any acts of the respondents.

The record before this Court clearly indicates that there was no illegal agreement between the respondents and no damage to the petitioners caused by the respondents' alleged violation of the anti-trust laws.

Judge Dawson in his opinion (R. 564) summarized what was wrong with the petitioners' business by an analysis of the 195 pictures (excluding Red Shoes) released by petitioners during the four-year period of their operation:

97	pictures	grossed	under	$100,000 in the entire United States
51	"	"	between	$100,000 and $200,000
10	"	"	"	$200,000 and $300,000
16	"	"	"	$300,000 and $400,000
3	"	"	"	$400,000 and $500,000
18	"	"	over	$500,000

Again, Judge Dawson said that "the plaintiffs throughout their entire history have been weak companies" and that during the years 1946 through 1951 plaintiffs lost over $13,000,000 in the production of films and nearly $3,000,000 in the distribution of films (R. 563).

Plaintiffs testified they were perfectly satisfied with the play-off of their pictures in the so-called first-run theatres in New York City; yet, the record shows that out of 196 pictures referred to by Judge Dawson (and including RED SHOES), only 24 were shown in first-class, first-run theatres in the Broadway area; further showing that any trouble that plaintiffs may have had in distribution, not only in New York City, but throughout the world, was due entirely and completely to the lack of quality in the product distributed by plaintiffs. Plaintiffs released one outstanding picture during this period, to wit, "RED SHOES" but this picture was not released for general distribution and was shown on two a day reserve seat policy in the Bijou Theatre,

New York City, for over two years. After that, it was released to theatres and received a full play-off with extended playing time in the RKO theatres in New York City.

Petitioners' entire appeal is based upon the proposition that the Paramount decree made out a prima facie case of injury and damage, and that the case should be reversed and remanded to the District Court solely for the determination of damages.

ANSWERING THE AMICUS CURIAE BRIEF FILED BY THE ACTING SOLICITOR GENERAL:

On pages 5 and 6 of the amicus brief, the Acting Solicitor General states the Government's reasons for filing as an amicus curiae, and it is evident from an examination of the reasons that the Government desires that the trial courts in private damage suits give private plaintiffs every benefit possible to decrees or judgments obtained in Government anti-trust suits when used under the provisions of Section 5 of the Clayton Act. However, on page 6 the brief states as follows:

> "In view of the nature of the Government's interest, this brief is correspondingly limited to a discussion of the proper interpretation of the *Paramount* decree and takes no position on the other issues in this case."

Again, on page 14 of said brief, we quote the following:

> "The *Paramount* judgment was accordingly admissible in this case as *prima facie* evidence of a general conspiracy between the respondents which, to a significant degree, denied independent distributors access on a competitive basis to the New York first subsequent run market.
>
> "To use the judgment for this purpose, the petitioners did not need to show by reference to the *Paramount* record that the conspiracy in that case was specifically directed against themselves. *Emich Motors* v. *General Motors, supra,* at 571. But they

> were required to establish the other aspects of their *prima facie* case—namely, '* * * the impact of the (general) conspiracy on them * * * and evidence of any resulting damages.' Ibid.; cf. *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 543. On these others aspects, the Government, because of the nature of its interest in this case (supra, pp. 5-6), makes no comment and takes no position."

In other words, the Government does not support petitioners' contention that the Paramount decree standing by itself made out a prima facie case for the petitioners herein but, on the contrary, the Government says the petitioners must in addition prove "the impact of the general conspiracy on them and evidence of any resulting damages"; nor does the Amicus take the position that the prima facie evidence established by the introduction of the decree cannot be rebutted by the respondents against whom the decree has been offered.

Again, the Acting Solicitor General recognizes that under Section 5 of the Clayton Act the prima facie evidence applies "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." (See quotation at bottom of page 6 from the statute)

TAKING UP THE QUESTION FIRST OF IMPACT, assuming that the decree made out a prima facie case of conspiracy, and assuming further that the respondents did not rebut this evidence, what impact would have to be shown to make out a plaintiffs' case against the defendants?

Petitioners were in the business of licensing motion pictures for exhibition throughout the world. Petitioners, therefore, must show that they had specific motion pictures to license for exhibition in respondents' theatres. Petitioners, therefore, must show that they tried to license their pictures in respondents' theatres, and respondents

because of the aforesaid conspiracy refused to license the specific pictures that petitioners offered to them.

First, petitioners offered no evidence of any kind or character from any member of their sales organization or any other individual that they at any time offered to license either RKO or Loew any of their motion pictures for exhibition in the first run Metropolitan New York area. Not only did petitioners fail in this respect but they affirmatively stated on the record, as heretofore set out in this brief, that they claimed no discrimination by either RKO or Loew against any individual picture distributed by respondents in the New York Metropolitan area (R. 124-R. 125).

Now, if there is no claim of discrimination by respondents against any specific picture distributed by them, how could there have been any impact, even assuming the two assumptions made in this portion of the brief?

On the second principle enunciated by the Solicitor General, "evidence of any resulting damages",—this question has been completely covered not only in this brief but in the brief submitted by Loew's, Inc.

CONCLUSION

ON THE LAW AND ON THE FACTS THE JUDGMENT OF THE DISTRICT COURT AND THE COURT OF APPEALS SHOULD IN ALL RESPECTS BE AFFIRMED.

Respectfully submitted,

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